**Patton v. Vanterpool, S17A0767,** October 16, 2017

 2017 WL 4582398

by: Margaret Gettle Washburn, sr. cont. ed.

The Court reversed the grant of summary judgment, Superior Court of Chatham County, to the Mother on the issue of paternity in a divorce action, finding that O.C.G.A. § 19-7-21, which creates an irrebuttable presumption of legitimacy with respect to children conceived by means of artificial insemination does not extend to children conceived by in-vitro fertilization treatment. This opinion and the dissent are a fun read, however, leaves open the question as to the status of a child of in-vitro, which is the emphasis of the dissent.

 In this very interesting case, the Supreme Court, Justice Carol Hunstein, held that OCGA § 19-7-21 creates an “irrebuttable presumption” of legitimacy with respect to “[a]ll children born within wedlock or within the usual period of gestation thereafter who [were] conceived by means of *artificial insemination.*” (Emphasis supplied.)

 **This appeal presents the question of whether that irrebuttable presumption applies to children so conceived by means of *in-vitro fertilization* (“IVF”).** **The Court found that OCGA § 19-7-21 does not create the same presumption and reversed the judgment of the superior court.**

 David Patton (“Appellant Father Father”) filed a complaint for divorce against Jocelyn Vanterpool, M.D. (“Appellee Mother Mother”) in January 2014. They had been married 3 years. While the case was pending, the parties consented to Appellee Mother undergoing IVF treatment, which would eventually utilize both donor ova and donor sperm. On November 10, 2014, Appellee Mother traveled to the Czech Republic for the IVF procedure. Four days later, on November 14, 2014, a final judgment and decree of divorce was entered in the divorce action. The divorce decree incorporated the parties’ settlement agreement, **which reflects that, at the time of the agreement, the parties neither had nor were expecting children produced of the marriage**. (emphasis supplied).


 On June 6, 2015, Appellee Mother gave birth and moved the superior court to set aside the decree of divorce, seeking to include the minor child in the divorce agreement; this motion was denied. Appellee Mother thereafter instituted a paternity action against Appellant Father, alleging that he gave written, informed consent for IVF and that OCGA § 19-7-21 created an irrebuttable presumption of paternity; Appellee Mother also sought child support.

In response, Appellant Father argued that he did not meaningfully consent to IVF and that, even if he did, OCGA § 19-7-21 is unconstitutional. **The trial court sided with Appellee Mother, granting her summary judgment on the issue of paternity.**

 In September 2016, the Supreme Court granted Appellant Father’s application for discretionary appeal, asking the parties to address whether OCGA § 19-7-21 applies to children conceived by means of IVF and, if so, whether OCGA § 19-7-21 is unconstitutional. Further, to interpret OCGA § 19-7-21 to determine whether the irrebuttable presumption created with respect to children conceived by means of “artificial insemination” extends to children conceived by IVF therapy.

 The Court stated: “Under our well-established rules of statutory construction, we
presume that the General Assembly meant what it said and said what it meant. To that end, we must afford the statutory text its “plain and ordinary meaning,” we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would.” Deal v. Coleman, 294 Ga. 170, 172-173 (751 SE2d 337) (2013).

 OCGA § 19-7-21 concerns the parent-child relationship generally, stating as follows: “All children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination**.” At issue here is the term “artificial insemination,” which is not defined by statute.** (emphasis supplied). The Court noted: There is no dispute that the child was born “within the usual period of gestation” following the marriage.

 Artificial insemination, has been consistently defined as the “introduction of semen into the uterus or oviduct by other than natural means . . . in order to increase the probability of conception.” Webster’s Third International Dictionary 124 (1967). (The Supreme Court’s decision also included other definitions of Artificial Insemination). Further, this procedure has been understood for over 150 years, see, e.g., J. Marion Sims, Clinical Notes on Uterine Surgery: With Special Reference to the Management of the Sterile Condition 372 (1866), artificial insemination involves the introduction of *semen* to the female reproductive tract to further the purpose of *in vivo*fertilization of an ovum.

“We conclude, given the history and well-established meaning and use of the term **“artificial insemination,” that the term is not ambiguous as it is used in OCGA § 19-7-21.We now must address whether artificial insemination includes IVF”.** Further, the Court found, through much thorough discussion in the opinion: “In-vitro fertilization was first described in the 1970s, see Janet L. Dolgin, The Law Debates the Family: Reproductive Transformations, 7 Yale J. L. & Feminisim 37 (1995), **and involves “[a] procedure [in] which an egg is fertilized outside a woman’s body and then inserted into the womb for gestation.”** Black’s Law Dictionary 956 (10th ed. 2014).” The Court’s opinion contains a lengthy discussion of the procedure and the background of the procedure.

 The Court found: “To summarize, while artificial insemination involves the introduction of sperm to the female reproductive tract to encourage fertilization, IVF involves implanting a fertilized egg into a female; though each procedure aims for pregnancy, the procedures are distinct, and **we conclude that the term “artificial insemination” does not encompass IVF.”** The Court also listed several cases involving other courts in other states that have reached this same conclusion.

 The Supreme Court did not agree with the Appellee Mother’s argument that such a plain-language construction of OCGA § 19-7-21 is unnecessarily restrictive. While Georgia law favors legitimation, OCGA § 19-7-21 creates an *irrebuttable presumption,* which is generally disfavored in the law. “**Further, the irrebuttable presumption of legitimacy in OCGA § 19-7-21 is an exception to the general rule, found in § 19-7-20 (b), that legitimacy may be disputed**, and an expansive reading of OCGA § 19-7-21 would allow the exception to swallow the rule”. The Supreme Court also disagreed with the Appellee Mother’s argument that when the General Assembly enacted OCGA § 19-7-21 in 1964, that they could not have conceived (was a pun intended here?) of the advent of IVF (and related medical advancements) and that a plain-language construction of OCGA § 19-7-21, enacted over 50 years ago, is at odds with the plain purpose of the statute, which is to legitimate children born by means of reproductive technology.

 The General Assembly passed the “Domestic Relations – Guardian – Social Services – Options to Adoption Act,” which amended Chapter 8 of Title 19 to address, among other things, the custody, relinquishment, and adoption of embryos. in **2009**, (Ga L. pp. 800-­803). **OCGA § 19-8-40, which was created by the 2009 Act, defines both embryo and *embryo transfer,*** which “means the medical procedure of physically placing an embryo into the uterus of a female.” OCGA § 19-8-40 (3). As discussed above, “embryo transfer” is a key component of IVF, and the language employed in the definition of “embryo transfer” tracks the standard definition of IVF.

 “We presume that, when the General Assembly passed the 2009 Act, it “‘had full knowledge of the existing state of the law and enacted the [the Act] with reference to it.’” Thus, **as late as 2009, the General Assembly was aware of the existing language of OCGA § 19-7-21 and was familiar with advances in reproductive technology, yet chose to leave the statute unchanged. Accordingly, this is not a case in which the General Assembly has failed to anticipate scientific and medical advancements, but, instead, the General Assembly has chosen not to act; we must, therefore, presume that OCGA § 19-7-21 remains the will of the legislature**.

 **Thus, the Court reversed the judgment of the Superior Court**, Hines, C.J., Melton, P.J., Benham, Nahmias, Blackwell, Peterson, and Grant, JJ., concurred. Justice Boggs did not participate. Judge Christopher J. McFadden dissented.

 **The dissent by Presiding Judge McFadden**, is a great read, and is longer than the Opinion. He dissented, and gave a **great explanation of the Mischief Rule.** (The following paragraphs are excerpts from the dissent.)

 OCGA § 19-7-21 contains a latent ambiguity. The ambiguity arose because the General Assembly failed to anticipate subsequent advances in medical technology when it described the class of children under the statute’s protection”. In resolving that ambiguity, we are required to apply a rule that is in our current Code, was in our first Code, can be traced back to Blackstone’s Commentaries on the Law of England, and so was part of the “common law and statutes of England in force prior to May 14, 1776 [that, in 1784,] were adopted in this [s]tate by statute.”

Often called the “mischief rule,” as Blackstone’s Commentaries refer to “the old law, the mischief, and the remedy,” **that rule is now codified at OCGA § 1-3-1 (a): “In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy.” That rule directs us to the conclusion that the intention of the General Assembly was to protect children like S., the child in this case. So I respectfully dissent…”**

 “Turning to the statute before us, OCGA § 19-7-21, it was enacted in 1964. In distinguishing the children who are under its protection from children who are not, it references only children conceived of artificial insemination, which is a type of assisted reproductive technology. Id. S. was conceived by means of in vitro fertilization, another type of assisted reproductive technology that was not developed until a decade later. **The statute therefore contains a latent ambiguity: into which category does a child like S. fall? Is a child like S. under the statute’s protection or not? The statute must be construed to resolve that latent ambiguity.**

 OCGA § 1-3-1 directs us to perform two distinct inquiries. Subsection (a), as noted above, is our codification of the mischief rule; it directs us to find the intention of the General Assembly by examining “the old law, the evil, and the remedy.” Subsection (b) directs our attention to the text, the words in the statute….

 Westlaw searches indicate that OCGA § 1-3-1 (a), OCGA § 13-2-3, or the principle set out in those Code sections have been cited hundreds, if not thousands, of times by this Court and by our Court of Appeals. **Very often the authority cited for the mischief rule is case law rather than statutes. See, e.g., *Cox v. Fowler,* 279 Ga. 501, 502 (614 SE2d 59) (2005) for the proposition that “[t]he cardinal rule in construing a legislative act, is to ascertain the legislative intent and purpose in enacting the law, and then to give it that construction which will effectuate the legislative intent and purpose** proposition that in interpreting legislative acts, “the courts shall look diligently for the intention of the General Assembly keeping in view at all times the old law, the evil and the remedy”).

 Judge McFadden further wrote: “The only fair reading of OCGA § 1-3-1 (a) is that it is a codification of the mischief rule. The only fair reading of *Gibson* and the similar cases it cites is that the mischief rule has been quietly excised from our law, that we no longer inquire into “the old law, the evil, and the remedy,” and that while OCGA § 1-3-1 (a) is still on the books, it is a dead letter. That is not how we should operate. **We should either strike down OCGA § 1-3-1 (a), as well as the statutes that enforce the intent of parties to a contact, and let fall all that must fall with them — or we should faithfully administer them.
I would faithfully administer them — albeit with the perils and temptations of such analysis firmly in mind. Administering OCGA § 1-3-1 (a) here requires us to construe OCGA § 19-7-21 so that S. comes under its protection. So I would affirm”.** See *Gibson v. Gibson,* 301 Ga. 622, 631-632 (3) (c) (801 SE2d 40) (2017) (footnote omitted).

(all emphasis supplied.)